

Alternative Dispute Resolution

Shaking the Arbitration Blues

By Robert J. MacPherson

Arbitration, the original alternative dispute resolution process, has lost some of its luster. Many blame lawyers. It's time to move past that and do something about the problem.

Commercial arbitration as we know it today grew out of a practice in certain trades of using disinterested business people to resolve disputes. Those in the garment industry thought it better to have someone knowledgeable about fabrics decide disputes between a dress manufacturer and her fabric supplier. Diamond dealers and jewelers in New York's "Diamond District" call upon someone from their industry to resolve disputes, not a judge. Likewise, the construction industry has a long history of using arbitrators well versed in construction to resolve disputes.

As disputes became more complex and the amounts in controversy increased, there was a trend away from pure industry arbitration. More frequently than not parties are represented by attorneys in arbitration proceedings and many arbitrators are now

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lawyers. With more lawyers came more legal procedures and formalities, such that commercial arbitrations are in many cases indistinguishable from litigation. Arbitration is no longer necessarily faster or cheaper than litigation. The reasons are many, but the real culprit is the old saying, "when the only tool you have is a hammer everything looks like a nail." The result of driving a wood screw with a hammer is an ugly sight. Conducting an arbitration no differently than you would try a case in court can have the same result. Lawyers must take advantage of the flexibility of the arbitration process if they are to achieve the time and cost savings arbitration is intended to provide. It is not difficult to do and can actually be quite satisfying. And it need not come at the expense of a fair and just result.

Lawyers like to be in control. If you write the rules and procedures for your arbitration, you will control the process. Of course, you will need the cooperation and consent of your adversary and the arbitrator, but that will not be a problem once you understand what is possible and if your proposed process is fair to all.

The first step is to understand who your arbitrator is; not the particular individual, but the attributes of the modern arbitrator. While many industry arbitrators remain (that is, the industry executive who serves on the occasional panel), many arbitrators practice in the field on a full-time basis or as an integral part of their law practice. These arbitrators are in a sense "professional jurors." They

don't need the rules of evidence to shield them from things like hearsay. They can make their own informed judgment about what weight to give a document that has not been admitted through a live witness. They typically practice in the field of law at issue and don't need to be educated in the trade practices, or the basic legal concepts involved.

Perhaps more importantly, today's arbitrator is a highly skilled and trained dispute resolution professional. They are well-versed in the process and procedure of dispute resolution. They know what makes hearings go smoothly and why some cases sometimes get bogged down and take far too long and cost far too much. They will be more than willing to offer suggestions on how your case can be efficiently arbitrated, or to assist you in developing your own ideas on how the matter should proceed. The modern arbitrator understands the essential role of the advocate as the partner of the arbitrator in fashioning the process to fit the dispute and welcomes the active participation of counsel. Most also understand that the process belongs to the parties, not the arbitrator. If both sides agree on a certain procedure, the modern arbitrator will not insist on a procedure the arbitrator prefers.

Modern arbitrators are also very cost conscious. They would like to think the service they deliver has real value. They certainly don't want to bill time unnecessarily, especially for time spent doing tasks the parties have not asked them to do or have not understood they asked the arbitrator to do. For example, many parties, without much thought, ask the arbitrator to write an award

with detailed findings of fact and conclusions of law. Writing that kind of award takes a great deal of time and is usually unnecessary. A concise, reasoned award with a detailed calculation of the damages should be sufficient in most cases.

When it comes to arbitrators, more may or may not be better, but more costs more. Traditional wisdom seems to be that for all but the smallest dispute a three-member panel is appropriate. The thought is that having three members will temper the tendency of any single arbitrator to "go rogue." That may have been true when most arbitrators served only occasionally, and there were few opportunities for training in ADR. That danger is far less with the modern professional arbitrator. If you are still concerned that having a single arbitrator is putting all your eggs in one basket, consider using one arbitrator for the hearings and then having a process in place whereby the award of that arbitrator can be appealed to a panel consisting of the single arbitrator and two others. That way you only incur the expense of the extra arbitrators in the event of an appeal.

The use of discovery methods like those used in civil proceedings has contributed considerably to the expense of arbitration, both because of the cost of the discovery itself and the time it adds to the process. Before engaging in litigation-like discovery, ask yourself if it is really necessary given the issues in dispute. The odds are most if not all of the relevant documents were exchanged by the parties during the performance of the contract out of which the dispute arose. Most arbitrators will require each side to produce, well in advance of the hearings, any documents they intend to use to prove their case, with the sanction of not being allowed to introduce into the arbitration record anything not produced. That would include the documents necessary to prove any damages and any documents relied upon by experts. If experts will testify, written reports should also be exchanged before the hearings. As for depositions, if considered absolutely necessary, limit their number and length. One day per witness is normally more than enough. But, before you take those depositions, think back to the last case you arbitrated and ask yourself: How useful were those depositions? Were they worth the expense?

The largest expense is the hearings themselves. Cost is a factor of time; the more hearing days, the more costly the arbitration.

You are limited only by your imagination and creativity in coming up with ways to reduce the number of hearing days.

Since we all know work expands to fill the time allotted, a simple way of reducing hearing time is to set strict time limits on the presentation of direct proofs and cross-examination. The times can only be established after the parties and the arbitrator have a good sense of the issues involved, the number of witnesses and volume of the exhibits. Once set, however, the rule should be that times cannot be exceeded without good cause. If you know you have to get it done in one day, you will. A word of caution about time: Some think marathon hearings days, say from 8:00 a.m. to 8:00 p.m., is the way to get the hearings done quickly. Such a long hearing day can be counterproductive. A hearing day from 9:00 a.m. to 5 p.m. is much more manageable and about the limit of the attention span of most people. It also allows the parties time for preparation before and after the hearing.

If the case involves several discreet issues, such as disputed change orders on a construction project, conduct mini-trials on each discreet issue, with both the proofs and defense heard at the same time. This is much easier for the arbitrator to follow and may allow the arbitrator to make interim rulings. Those interim rulings may also be dispositive of, or lead to a settlement of other similar issues.

During traditional trials and arbitration, each side puts on several witnesses who have dealt with some aspect of the dispute. The usual procedure is for each witness to testify as to his involvement from beginning to end and then be cross-examined. Testimony presented in this manner can be disjointed and is often repetitive of what other witnesses have covered. Use of a witness panel addresses this problem by presenting as a group witnesses who have had overlapping involvement. Legislative hearings often use witness panels. While this format is novel in arbitration, there is no substantive or procedural reason not to use it. During questioning of the panel the arbitrator or counsel can direct questions to a specific member of the panel or to the panel as a whole. Alternatively, the questioner can invite one or more panelists to respond to what another witness has said. The obvious ground rule is that only one person can speak at a time.

Cross-examination is also conducted of

the entire panel. A skilled cross-examiner can use the panel method to advantage. Rather than asking whether witness A recalls the allegedly conflicting testimony of witness B, the cross-examiner can ask witness B if the cross-examiner's summary of witness B's testimony is accurate. Then the cross-examiner can ask witness A how she squares that with her own testimony. While the cross-examining attorney can limit questions to a specific witness, the attorney needs to be aware that the arbitrator may allow other panel members to answer the question.

Commercial arbitration more often than not involves expert testimony, and the arbitrator will be called upon to choose between conflicting expert opinions. A procedure that greatly enhances the arbitrator's ability to understand, analyze and make decisions involves having both experts available for simultaneous questioning. The goal is to encourage the experts to honestly debate the differences in their methodologies, opinions and conclusions for the benefit of the arbitrator. Joint examination of experts is an attempt to meld the best features of a system under which each party retains its own expert, as is common in the United States, and the procedure used in other jurisdictions where the court or arbitrator retains an expert to serve as a neutral technical adviser.

The joint examination can take place after each expert has testified, but there is no reason a joint examination of the experts cannot occur in lieu of individual expert testimony. During the joint examination, the arbitrators may question the experts or ask one expert to respond to a position taken by the other. Counsel may also ask questions of the opposing experts, and the experts themselves may question each other. The purpose of the procedure is to educate the arbitrator, who should control the joint examination. Making speeches and carrying on a traditional cross-examination during this process is discouraged, while honest intellectual debate is invited. The role of the experts is to educate the arbitrator, and an exchange between them can be particularly enlightening.

The goal of arbitration is getting good, reliable information to the arbitrator, thereby enabling the arbitrator to make an informed decision. Lawyers who give serious thought over how to achieve that goal will be serving their clients' interests. They may also find it chases away the "clients don't appreciate all a lawyer does for them" blues. ■